



Exhibit 10

County of San Diego

LAND USE AND ENVIRONMENT GROUP

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January 30, 2009

John Robertus
California Regional Water Quality Control Board
San Diego Region 9
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San Diego, CA 92123-4340

2009 JAN 30 PM 3:37
SAN DIEGO REGIONAL
WATER QUALITY
CONTROL BOARD

NOTICE OF VIOLATION NO. R9-2008-0164 & REQUIRED TECHNICAL REPORT

Dear Mr. Robertus:

The County of San Diego (County) received Notice of Violation (NOV) No. R9-2008-0164 for violations of California Regional Water Quality Control Board, San Diego (Regional Board) Order No. R9-2007-0001, National Pollutant Discharge Elimination System (NPDES) Permit No. CAS0108758, Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of the County of San Diego, the Incorporated Cities of San Diego County, the San Diego Unified Prot District, and the San Diego County Regional Airport (Order). The County submits this letter and attachments in response to the NOV.

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Due to the complexity of the attached technical report I believe it would be helpful for County staff to meet with Regional Board staff to explain and discuss information contained in the technical report. If you have any questions concerning this letter, please

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feel free to contact me at (619) 531-5451, or Cid Tesoro, County Watershed Protection Program Manager, at (858) 694-3672.

Respectfully submitted,

A handwritten signature in black ink that reads "Chandra Wallar". The signature is written in a cursive, flowing style.

CHANDRA L. WALLAR
Deputy Chief Administrative Officer

CLW:CT:cw

cc: Cid Tesoro, Department of Public Works

Enclosure

County of San Diego
Required Technical Report for NOV R9-2008-0164

This Required Technical Report responds to and provides data and information requested in Notice of Violation R9-2008-0164 ("NOV"), issued to the County of San Diego ("County") on December 23, 2008.

INTRODUCTION

The NOV was issued to the County because it has defined "rainy season" in its Watershed Protection Ordinance ("WPO") as the period from November 11 through April 30th. The basis of the violation is the disparity between the defined "wet season" in RWQCB Order R9-2007-0001 ("Order"), which is October 1 through April 30th and the period in the County WPO. All of the alleged violations flow from this disparity in dates.

The disparity in the dates occurred because the County engaged in discussions and the presentation of scientific data to RWQCB staff, at all levels, to support its use of the November 11th start date in its WPO. It was the understanding of County representatives from those discussions that the use of the later date in its WPO and practices would not be the impetus for violations of the Order. The issuance of this NOV certainly places the County on notice that its earlier understandings are no longer a condoned approach to the applicable period of the wet or rainy season in the WPO.

In responding to the NOV, the County requests that RWQCB staff consider the past County understanding of the acceptability of the November 11th date, as evidenced by the RWQCB acceptance of past compliance reports utilizing that rainy season period without comment¹, until staff recently advised the County that it should use the October 1 start date. The County will agree prospectively to apply the wet season definition of October 1 to April 30th as directed, in light of the clarification of the RWQCB position conveyed by issuance of the NOV. However, the County requests that a prospective approach to the clarification be used in assessing any proposed penalties for alleged violations stemming from use of the November 11th start date.

As a result of the County's agreement to take action to fully address RWQCB's concerns and in light of the fact that this problem arose out of a misunderstanding, the County believes that no further enforcement action is necessary. In further support of this position, the County would request that RWQCB take note of the fact that the rainfall totals in the County from October 1 to November 11 in 2007 and 2008 based on sampled gauges were significantly below those occurring during other wet season months. In addition, the WPO requires that adequate and functional BMPs be in place at all times of the year to prevent pollutants from entering an MS4. The alleged violations are, therefore, process-related and did not impact water quality in any way and the objectives of the Order were accordingly met at all times by the County.

1. EXPLANATION OF ALLEGED VIOLATIONS

Violation I. Alleged Failure to Provide Authority to Achieve Full Compliance with the Order

The NOV alleges the County has failed to "update its grading ordinances as necessary to achieve full compliance with this Order, including requirements for the implementation of all designated BMPs

¹ See, for example, Annual Report 2002-2003, Section 7.2.1 ("SSM Section F.3.1.1 has been updated to change the date from October 1 to November 11 that vegetation used for slope stabilization must be established."); and, Annual Report 2003-2004, Section 7.2.2 ("SSM Section F.3.1.1 has been updated to change the date from October 1 to November 11 that vegetation used for slope stabilization must be established.").

and other measures” because the County’s updated WPO defines the rainy season as November 11 through April 30 rather than the wet season definition of October 1 through April 30 provided in the Order.

As noted in the Introduction, above, the County defined the wet or rainy season as November 11 – April 30 to be consistent with the understanding that the County had reached with RWQCB staff.

The County also notes that the Order requires the County implement, or require the implementation of BMPs on all sites, and the Order requires the County to update its legal authorities as necessary to achieve compliance with all applicable provisions of the Order. The Order does not require that the County adopt a wet season definition of October 1 through April 30 in the WPO. The County does agree to propose to the Board of Supervisors that the WPO definition should be modified to reflect a wet season consistent with the dates set out in the Order.

Furthermore, any existing inconsistencies between the definitions in the WPO and the Order would only constitute violations if they impeded the County’s ability to achieve compliance with the Order. Since the County has adequately implemented, or required the implementation of BMPs on all sites during periods addressed by the NOV, there is no evidence to indicate that the County has failed to establish sufficient legal authority for achieving full compliance with the Order.

Violation II. Alleged Failure to Require Construction Site BMPs during the Wet Season

The NOV alleges that the County has failed to “implement, or require the implementation of, the designated minimum BMPs and any additional measures to comply with this Order at each construction site ... year-round” because the County requires only Weather Triggered Action Plans (rather than full BMP implementation) during the period of October 1 through November 10.

The County disagrees with this allegation. The Weather Triggered Action Plan (“WTAP”) is not required, but is provided as an option by the County for some construction sites and activities between October 1 and November 10 of each year. While the WTAP does provide developers some flexibility in the deployment of BMPs, the County has either implemented, or required the year-round implementation of BMPs on all construction sites within its jurisdiction in accordance with all applicable provisions of Section D.2.c of the Order.

Section D.2.c generally requires that the County implement BMPs year-round, although Section D.2.c.(1)(b)iii is specific to the rainy season for slope stabilization on all inactive slopes during the rainy season and during rain events in the dry season.

While the WPO and Director’s Letter of Instruction DLI-LD-1 (“DLI”) for private development define the rainy season as November 11 through April 30, the County’s Water Pollution Control Program (“WPCP”) and Storm Water Pollution Prevention Program (“SWPPP”) specifications for Capital Improvement Projects (“CIP”) define the rainy season as October 1 through April 30. Therefore, the rainy season for CIP projects was in conformance with the rainy season in the Order through the period of October 1 through November 10 for both 2007 and 2008.

The following discussion applies to private developments during this time period.

The DLI states, “[a]t all times, the Developer must provide protection of the grading site perimeter, environmentally sensitive areas, watercourses and at operational internal inlets to the storm drain system. Protection shall be accomplished through use of filtration devices, silt fencing, straw, coconut fiber or wood fiber-rolls, gravel bag barriers, or gravel inlet filters. Capture of sediment and dust shall also be accomplished through the use of storm-drain inlet protection and construction

road stabilization.” Therefore, regardless of the time of year, the developer must prevent soil erosion and must practice sediment controls.

Irrespective of the season, disturbed soil areas are considered active whenever soil-disturbing activities have occurred, continue to occur, or will occur during the ensuing 10 days. Non-active areas are required to be protected within 10 days of cessation of soil disturbing activities or prior to the onset of precipitation, whichever occurs first.

The DLI allows developers to use a WTAP in lieu of some fully deployed BMPs related to active slopes and building pads from May 1 through November 10. A WTAP may not be used in lieu of BMPs required for grading site perimeters, environmentally sensitive areas, watercourses, or operational inlets to storm drain systems. All BMPs for these areas must be installed and functional year-round, regardless of the season. The WTAP must demonstrate the ability to deploy standby BMPs to completely protect the exposed portion of the project site within 48 hours of a National Weather Service (NWS) predicted storm event. If the NWS predicts a 50% chance of ½ inch or more of rain, the BMPs must be deployed within 48 hours and prior to the onset of precipitation. A minimum of 125% of the material needed to install weather triggered BMPs must be stored on site.

Alternatively, if the developer chooses not to use a WTAP during the non-rainy season (May 1 through Nov. 10), he must fully deploy the required BMPs to protect the site. There are four instances in the DLI that provide the developer some flexibility in how BMPs are deployed between October 1 and November 10. These four instances are discussed below. It should be noted, that regardless of whether or not a WTAP is used, the County requires stabilization of all inactive slopes throughout the entire wet weather season and requires stabilization of all active and inactive slopes during rain events.

(1) Physical Stabilization of Slopes

The DLI Standards Section 2.A (page 4) states, “if Physical Stabilization is to be used it must be fully deployed prior to and throughout the rainy season. Between May 1 and October 1, the Developer may elect to have a weather triggered action plan in lieu of full deployment. Between October 1 and November 10, the Developer may elect to have a weather triggered action plan but must still provide slope protection for all finished slopes that have not been planted and for which vegetation will not be established by November 10.”

The DLI Standards Section 2.B. (page 4) states, “if Vegetation Stabilization is proposed to stabilize slopes it may be installed between May 1 and September 15 if slope irrigation is in place and operable. Vegetation must be watered and established prior to November 11. The Developer shall implement a contingency physical BMP by November 11 if vegetation establishment does not occur by that date. If landscaping is proposed and/or required, erosion control measures and physical stabilization that will not inhibit growth (i.e. Stabilizing Fiber Matrix hydromulch, geotextiles, mats, etc.) must also be used while landscaping is being established. Established vegetation shall have a subsurface mat of intertwined mature roots with a uniform vegetative cover of 70 percent of the natural vegetative coverage or more on all disturbed areas.” Slope irrigation is associated with planted plants rather than seed mixes. If the vegetation has not taken hold by October 1, then physical stabilization is required.

(2) Slope Limitations

The DLI Standards Section 3.C. (page 4) states, “during the rainy season flat areas of less than 3% (like building pads, parking areas, and leach fields) shall have 100% protection using BMPs listed in 2 or 3B above. In addition, tracking and soil stabilizers/binders, temporary seeding, mulch/wood chips, or jute matting may be used.

During the non-rainy season a developer may elect to have a weather triggered action plan in lieu of full deployment, but must adhere to other BMPs including the 10-day non-active area requirement. These requirements will be waived if full sediment control is provided through Standard Lot Perimeter Protection Detail or constructed and maintained desilting basins at project discharge points.” The Lot Perimeter Protection Detail or desilting basin is the method used by most project applicants. Unpaved roads are protected using soil stabilizers for wind erosion and sediment control. Regardless of the option chosen, all inactive slopes must be stabilized.

(3) Graded Pads

The DLI Standards Section 4 (page 4) states, “during the rainy season areas of graded pads that must remain unobstructed to allow ongoing construction may be protected by rolled plastic as part of a weather triggered action plan until the structure’s roof has been completed. During the non-rainy season a weather triggered action plan may be used and include erosion control measures identified above or use of a desilting basin. If a desilting basin is used, then a weather-triggered action plan is not required for a graded pad.” The Lot Perimeter Protection Detail or desilting basin is the method used by most project applicants. Regardless of the option chosen, all inactive pads must be stabilized.

(4) Ongoing and Rough Grade Inspections

The DLI Grading Inspection Section 3.B. (page 11) states “[e]rosion Control BMPs shall be installed as soon as the finished slopes and flat areas are complete, or when slopes and flat areas have not been actively graded for 10 workdays. From May 1st to September 15th vegetation stabilization may be installed. If vegetation stabilization is used, a slope irrigation system shall be in place and operable. If the vegetation is not established by November 11, then additional physical or hydraulic erosion control BMPs are also required. In the event the Developer has elected to employ a weather-triggered BMP action plan during the non-rainy season, 125% of all needed BMP materials shall be stored onsite to allow full deployment and installation within 48 hours or less.” The September 15th date allows for vegetation to grow and take root. Because the slope is already landscaped, the vegetation is sufficient to provide protection during October 1 through November 10. Also, vegetation stabilization at rough grading equates to landscaping. As required in DLI 2.b. (page 4), landscaping requires erosion control measures and physical stabilization that will not inhibit growth.

Violation III. Alleged Failure to Inspect Construction Sites during the Wet Season

The NOV alleges that the County has failed to conduct inspections of construction sites during the period of October 1, 2008 through November 10, 2008. Moreover, the NOV states that “[w]hen asked during the December 2, 2008 meeting if the County conducted inspections between October 1, 2008 and November 10, 2008, the County responded that they had not.”

As noted in the Introduction above, the County’s actions during this period were consistent with the understanding the County had reached with RWQCB staff that the October 1 – November 10 be considered part of the dry season. In addition, during the December 2 meeting, County staff did not respond that construction inspections were not conducted between October 1, 2008 and November 10, 2008. Inspections were conducted during that period. Documentation of inspection results is provided in Attachment 1.

Violation IV. Alleged Failure to Report Confirmation of BMP Implementation

The NOV alleges the County has failed to “report confirmation of BMP implementation between October 1 and November 10 in the Annual Report and during the [December 2, 2008] meeting.”

As noted in the Introduction above, the County's actions during this period were consistent with the understanding that the County had reached with RWQCB staff that October 1 – November 10 be considered part of the dry season.

In addition, the County notes that the JURMP Annual Report Table 3.6 reports overall site compliance (% of sites without violations, which the County uses as an indicator of effective BMP implementation) for Department of Planning and Land Use ("DPLU") Building and Department of Public Works ("DPW") Private Development Construction Inspection ("PDCI") sites for the entire reporting period (FY 2007-08). Table 3.10 also provides a verification that required inspection steps were conducted for all private construction programs, including a description of how BMP evaluations are incorporated into the inspection process. While reported inspection results do not differentiate between the wet and dry seasons, the Order does not require that such a distinction be made. This violation appears to be predicated on an assumption the County has excluded the period of October 1 through November 10 in the results it reported, but this is not the case.

Please also note the County did not "report confirmation of BMP implementation" during the December 2 meeting because County staff were not directly asked to do so.

Violation V. Alleged Failure to Report Construction Inspections

The NOV alleges the County has failed to report "[f]or each construction site within each priority category (high, medium, and low), identification of the period of time (weeks) the site was active within the rainy season, the number of inspections conducted during the rainy season, and the number of inspections conducted during the dry season, and the total numbers of inspections conducted for all sites."

As noted in the Introduction above, the County's actions during this period were consistent with the understanding that the County had reached with RWQCB staff that October 1 – November 10 be considered part of the dry season. Therefore, the County did not report wet season results according to the wet season definition of October 1 through April 30, but instead used a start date of November 11 for most results. The County did, however, provide the total number of inspections conducted for all sites, and the County did provide all required reporting parameters for the inspection data that was submitted.

2. PLANNED ACTIONS

The NOV requires the County to describe and document that it is taking the appropriate actions to come into compliance with the Order, including proposed or current changes to the organizational structure, changes in responsibilities of any department, the appointment of any individual or department to ensure compliance within multiple departments, or planned coordination efforts between the multiple departments.

a. Site Inspections

It must be noted that the County's inspection program was still being refined during the 2007 rainy season. While the County strived to meet 100% of inspection responsibilities, the reality is that the program and internal County processes were still transitioning. However, as a way of improving the County's continued compliance with the Order, some process changes can be implemented. Private construction inspections are conducted by DPLU Building Division and DPW PDCI. The planned actions that each group will take to continue to ensure compliance with the Order in future reporting periods are described below.

DPLU oversees the stormwater inspections for permit programs related to single family residents as well as minor grading permits. The stormwater inspections are triggered by the County's business process Kiva software. Within Kiva, each project is assigned a pseudo permit which triggers inspection notification as defined by program parameters. To date, for the reasons discussed in the Introduction above, these triggers were set for the rainy season start date of November 11, as defined in the County's WPO. In response to this NOV, DPLU Building Division will modify the wet season inspection triggers to begin on the date that the Order establishes as the beginning of the wet season.

PDCI initiates stormwater inspection scheduling based on project priority once a permit has been issued for construction. PDCI will modify the date in the DLI to reflect the beginning of the wet season as specified in the Order. PDCI will continue to ensure its required annual stormwater inspections are completed by the required date and will also require pre-inspections during the month prior to the established date each year to ensure development sites are properly prepared for the coming wet season.

b. BMP Implementation

See the explanation provided above for # 1 (Violation II). As described, the County has either implemented or required the implementation of BMPs on all construction sites within its jurisdiction in accordance with the provisions of Section D.2.c. Therefore, no planned actions are required in response to alleged violations related to BMP implementation.

The County does, however, intend to propose to the Board of Supervisors that it modify the WPO and will modify the DLI to include a wet season definition that matches the dates contained in the Order for the wet season.

c. General Program Management

Although it is not directly responsible for implementing the County's construction programs, the Watershed Protection Program ("WPP") plays an important role in coordinating various departments' activities and consolidating data for annual reports and JURMPs. As an additional measure to ensure consistency throughout the County departments in construction-related permit compliance, the WPP will be consolidating the responsibility for public and private construction compliance oversight under Sara Agahi, Program Manager. The WPP Program Manager will have the following specific responsibilities: (1) meet at least quarterly with the responsible manager for each program, (2) provide regular updates to the group on current issues or program modifications, (3) review and approve proposed training programs, and (4) oversee and approve the development and modification of applicable JURMP and JURMP Annual Report sections.

d. Schedule for Watershed Protection Ordinance Modification and Adoption

The County will propose to the Board of Supervisors that it modify the WPO to incorporate a wet season definition that matches the dates set forth in the Order. This change will be adopted prior to the beginning of the 2009 wet season. WPO modifications require two hearings by the County Board of Supervisors, and take effect 30 days after the second hearing. Taking into account the Board's current 2009 meeting schedule, staff plans to take this change to the Board for a first hearing no later than July 22, 2009 and for a second hearing by August 5, 2009.

3. WET SEASON CONSTRUCTION INVENTORIES AND INPECTIONS.

Attachment 1 provides a complete inventory of private and public construction sites within the County's jurisdiction for the periods of October 1, 2007 through April 30, 2008, and October 1, 2008 through November 10, 2008.

4. ESTIMATE OF INSPECTIONS REQUIRED BUT ALLEGEDLY NOT CONDUCTED

The County was requested to provide an estimate of the number of construction sites that were required to be inspected, but were not from October 1, 2007 to November 10, 2007 and from October 1, 2008 to November 10, 2008. As indicated above in the Introduction, the County believes that in accordance with the understanding that had been reached with RWQCB staff that all required inspections were completed.

a. Private Projects

If, as the County understood, the wet season did not commence until November 11 there would have been no specific inspection target and so no inspections would have been missed.

Using October 1 as the beginning of the wet season, Tables 1 and 2 below summarize the number of inspections completed.

Table 1: Estimated Number of Required Inspections Not Conducted for Private Construction Based on Changed Start Date of Wet Season (Oct. 1, 2007 through Nov. 10, 2007)

Dept./ Program	Low Priority	Medium Priority	High Priority
DPLU Building	0 of 2,498	100 of 170	2 of 25
DPW PDCI	0 of 170	11 of 82	4 of 70

Table 2: Estimated Number of Required Inspections Not Conducted for Private Construction Based on Changed Start Date of Wet Season (Oct. 1, 2008 through Nov. 10, 2008)

Dept./ Program	Low Priority	Medium Priority	High Priority
DPLU Building	0 of 952	0 of 43	0 of 17
DPW PDCI	0 of 76	3 of 19	4 of 177

b. Public Projects

All open CIP sites were inspected during the periods of October 1 through November 10, 2007 and October 1 through November 10, 2008. Site inventories and dates of inspection are provided in Attachment 1.

5. DESCRIPTION OF HOW THE COUNTY IMPLEMENTS OR REQUIRES THE IMPLEMENTATION OF ADEQUATE BMPs THROUGH THE PERIOD OF OCTOBER 1, 2007 THROUGH

NOVEMBER 10, 2007 AND OCTOBER 1, 2008 THROUGH NOVEMBER 10, 2008, AND WERE IN COMPLIANCE WITH THE ORDER.

This question is addressed above in item #1 (Violation II).

6. TYPICAL INSPECTION COSTS

Typical inspection costs vary by program and site complexity. Table 3 below summarizes estimated average inspection costs by program and site priority. Each was calculated by estimating the average amount of time required to conduct inspections and multiplying that by the hourly rate of a typical inspector. It should be recognized that considerable variability exists between sites within any given program or priority category.

Table 3: Estimated Average Inspection Costs by Site Priority

Dept./ Program	Low Priority	Medium Priority	High Priority
Private Construction			
DPLU Building	\$88	\$102	\$117
DPW PDCI	\$260	\$260	\$260
Public Construction			
DPW CIP	Not applicable	\$330	\$330
DGS CIP	\$139	\$139	\$139
DPR CIP	\$105	Not applicable	Not applicable